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No. 97-1748.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ALFRED RASO, ET AL.,

Petitioners,

v.

MARISA LAGO, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION.

CHESTER DARLING
Counsel of Record
DANIEL J. SUMPTION
MICHAEL WILLIAMS
306 Dartmouth Street
Boston, Massachusetts 02116
(617) 536-7755

Citizens for the Preservation of Constitutional Rights, Inc.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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STATEMENT OF THE ISSUES.

Each of the Respondents have raised new issues in their briefs in opposition: (I) whether the case is moot, (II) whether the statutory right-of-return is at odds with the Supremacy Clause, (III) whether this case is too fact-specific to be capable of repetition, (IV) whether the race neutral lottery is at issue in this case, (V) whether their actions merely reflect "racial concerns," not subject to strict scrutiny, and (VI) whether a right-of-return was created by a state statute.

ARGUMENT.

I. THIS CASE PRESENTS THE COURT WITH A LIVE CONTROVERSY FOR WHICH THE COURTS MAY GRANT EFFECTIVE RELIEF.

A. *There Remains A Live Issue Of Damages To The Displaced West Enders That Renders This Case Not Moot.*

The Respondent Developers argue that "[w]here petitioners have not 'suffered some actual injury that can be redressed by a favorable judicial decision,' no case or controversy exists. (Dev. Br. in Op., at 7). However, this Court has recognized that where there is an unlawful use of racial classification against a party, an injury to that party exists. *See Adarand* v. *Pena*, 515 U.S. 200, 211 (1995).

The Respondent Developers also argue this case is moot because the class was never certified and because "all qualified applicants in the lottery process who identified themselves as former residents of the West End have been offered apartments at West End Place." (Dev. Br. in Op., at 6). Petitioners dispute the accuracy of this claim and note again that offers to participate in a discriminatory housing scheme are not valid offers. Moreover, the Respondents' view of the plaintiff class is not consistent with how the district court viewed the issue of standing. The district court identified two putative classes before it: one, "headed by several former residents of Boston's Old West End neighborhood," and the other consisting of "the Old West End Housing Corporation." (Pet. for Cert., App. at 22a). The court acknowledged that "[t]he applications [] reveal the racial composition of the putative class," as consisting of 308 former West Enders,

identifying named plaintiffs, Alfred J. Raso and Frank Lavine as among the eligible applicants. (Pet. for Cert., App. 32a). Because Raso and Lavine's standing as plaintiffs representing the interests of the putative class was uncontested, the court did not address "the distinct and more difficult issue of organizational standing presented by OWEC." (Pet. for Cert., App. at 38a fn.11).

In *Assoc. Gen. Contractors* v. *City of Jacksonville*, 508 U.S. 656 (1993), this Court ruled that plaintiffs, who were seeking declaratory and injunctive relief, had suffered an injury that was within the jurisdiction of the courts to cure.

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit that it is for another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. *See, e.g. Regents of Univ. Cal.* v. *Bakke*, 438 U.S. 265. The 'injury in fact' element of standing in such an equal protection case is the denial of equal treatment resulting from the imposition of the barrier — here, the inability to compete on an equal footing in the bidding process — not the ultimate inability to obtain the benefit.

Id. at 665. This injury-in-fact has not been resolved and remains a live controversy capable of redress by the courts.

B. *None Of The Housing Offers Made To Petitioners Were Free Of The Taint Of Discrimination Against Them Or The Putative Class.*

In support of their argument for mootness, the respondents invoke self-serving letters written by the defendant Developers (that are not part of the trial record) to the named plaintiffs (Dev. Br. in Op. at 5a-10a). Two of the Petitioners refused to respond to the housing offers, the third is alleged to have asked that his name be taken off the developer's list. Not only were these letters not part of the trial record, but they were written, by a party, six, seven, and ten months respectively, after the adverse decision of the district court and while Petitioners were appealing the unfavorable ruling to the Circuit. These housing offers were conditioned on the very same constitutionally offensive terms as were rejected by Petitioners earlier, and which are the basis of this litigation.

II. THE SUPREMACY CLAUSE IS NOT APPLICABLE.

As the motion court noted, "§ 49(d) [] expressly contemplates that the statute will be administered in a manner consistent with federal law." (Pet. for Cert., App. at 50a). The federal regulation was, in fact, applied in a manner inconsistent with the race neutral mandates of federal law. As the dissent below noted, "quite clearly, defendant's conduct has had the effect of depriving plaintiffs of a benefit and was prompted by the fact that plaintiffs were mostly white." (Pet. for Cert., App. at 83a). Only valid regulations can be supreme under the Supremacy Clause. The HUD regulations

are not valid because their application was based on unlawful racial classifications.

III. Government Action Of The Type In This Case Is Capable Of Repetition.

In their opposition brief, at page 9, BRA argues that the issues in this case are not capable of repetition and therefor not deserving of this Court's attention. In its ruling, the First Circuit declared that a racial classification only exists where the government's action "reserv[es] benefits to a favored race" or where there is "an effort to segregate the races." (Circuit Court's Opinion, Pet. for Cert., App. at 75a). This reasoning is inconsistent with this Court's doctrine that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 273 (1986). The question for this Court is whether the First Circuit was correct in declaring that these practices are not subject to heightened judicial scrutiny.

The First Circuit's ruling also stands for the principle that government may subordinate race-neutral principles to race conscious ones without heightened judicial scrutiny is erroneous. *See Miller* v. *Johnson*, 515 U.S. 900 (1995) (subordinating race-neutral districting principles to racial purpose made districting constitutionally suspect) (slip op., at 15-16).

Given the continuing role of HUD in housing creation across the country, and the role of the City of Boston and the Boston Redevelopment Authority in housing created in the city of Boston and in Massachusetts, along with the uncertainty expressed by the lower court when it said it "sought to decide this appeal based on Supreme Court precedent, as best

we can discern it, recognizing that the case is a difficult and unusual one on the edge of developing law" (Pet. for Cert., App. at 78a), it is hard to see how the argument that the race-based rationale employed by Respondents to deprive the West Enders of housing is incapable of repetition elsewhere.

IV. THE LOTTERY SHOULD NOT BE AN ISSUE IN THIS CASE.

The lottery adopted after the withdrawal of the race-neutral statutory benefits should not be part of this case. It was the race-based decision to withdraw the benefits that the Displaced West Enders sought to have subjected to strict judicial scrutiny. Any discussion of the lottery only serves to obscure the true issue of this case.[1] The lottery has never been challenged by the Petitioners; it is the withdrawal of the statutory benefits that they have always challenged.

Contrary to the suggestions of the defendants, ruling in favor of the Displaced West Enders would not "prohibit 'every antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such statute' because they 'reflect a concern with race.'" (Dev. Br. in Op., at 13, *quoting in part* Circuit's opinion, Pet. App. at 73a). Nor would ruling in favor of the Displaced West Enders bar HUD from preventing racial discrimination in hous-

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[1] The BRA attempts to raise in their appeal, at page 18, footnote 16, an argument that the West Enders may not raise a challenge to the application of the consent decree with this Court. OWEC did not appeal Judge Skinner's denial of leave to intervene because it assented to his reasoning that the case did not determine their rights. (Pet. for Cert., App. at 21a.) They took Judge Skinner's advice and filed a new action. *Id.*

ing patterns. HUD would be free to enforce Titles VI and VIII to address *discrimination* in housing.

V. Defendant's Argument That Actions Based On "Racial Concerns" Are Not Constitutionally Suspect Misstates Both The Nature Of This Case And This Court's Precedents.

HUD attempts to make a distinction between racial concern and racial purpose. (HUD's Br. in Op., at 7). HUD's actions were not based on a mere concern with race, HUD admits that race was the *primary* purpose behind HUD's action.[2] The Circuit's majority acknowledged the "undenied racial motive." (Circuit's Opinion, Pet. for Cert., App. at 72a). This Court has clearly stated that where government's actions are based on a racial purpose they are racial classifications and subject to strict judicial scrutiny. The failure of both the Circuit and Motion courts to apply that level of scrutiny were errors that must be reversed. As this Court wrote in *Miller* v. *Johnson*, "[w]e recognized in *Shaw* that, outside the districting context, statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or objective." *Miller* v. *Johnson*, 515 U.S. 900 (1995) (slip op., at 11-12). The dissent below saw the error and addressed it this way: "it is the plaintiffs' 'personal right to equal protection of the laws,' [*Adarand*] 515 U.S. at 277,

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[2] Although HUD argued in its opposition brief that its actions were not race-based, but merely reflected a concern with race, HUD admitted and the Circuit Court found that "[t]his undenied racial motive" was the driving purpose behind HUD's actions. (Pet. for Cert., App. at 74a).

and not some non-party's interest in competing for that which would be the plaintiffs' but for his or her race, that is constitutionally safeguarded." (Pet. for Cert., App. at 82a).

Despite what some of the other Respondents may ascribe to HUD as their reason for requiring the withdrawal of the benefits from the Displaced West Enders, HUD states the actual reason: "[b]ecause minorities constituted approximately 41% of the city's population, but only 2% of the former West Enders, HUD concluded that FHA and the consent decree would not permit it to authorize federal funding if the tenant-selection plan set aside 100% of the new units for displaced West Enders." (HUD's Br. in Op., at 3).

HUD argues that merely because a decision was "prompted by racial concerns" does not subject it to strict scrutiny. (HUD's Br. in Op., at 7). The dissent did not view HUD's actions so benignly, however, "defendants conduct has had the effect of depriving plaintiffs of a benefit and was prompted by the fact that plaintiffs are mostly white." (Pet. for Cert., 83a). Where the *purpose* is to change the racial group which will benefit from a government action, the urban renewal of the West End, that change is suspect as a racial classification.

VI. Whether Or Not The Statute Created An Absolute Or Conditional Preference Is Irrelevant To This Case.

Defendants assert that since the preference granted by M.G.L. c. 121B, § 49 does not grant an absolute preference, the loss of the preference does not constitute a constitutional injury. Whether of not the preference granted by M.G.L. c. 121B, § 49(c) is an absolute or conditional preference is

irreverent to this Court's analysis. Any modification of the § (c) preference that was based on race must survive review under strict judicial scrutiny. Whether the preference was withdrawn based on the inapplicable consent decree,[3] or on waived HUD regulations, or on statutes, or as an *ad hoc* decision; a benefit was unquestionably redistributed based on race. Whatever the reason, it must survive strict judicial scrutiny.

A. *The Statute Created a Right of Return.*

Respondent BRA argues that, "[t]he Massachusetts statute most assuredly does not create a 'right of return' for displacees of urban renewal, and, hence, there is no right for this Court to vindicate. (BRA Br. in Op., at 10). This is a curious position for the Respondents to take since, in the case of *Charles River Park, Inc.* v. *Boston Redevelopment Authority*, Mass. App., C.A. No. 88-P-1008 (Dec. 5, 1988) the BRA argued that the statutory obligation on Charles River Park (CRP), Respondent Developers' predecessors, rose to the level of a trust: "[i]t may be that most of the original West End residents no longer are able or willing to return there . . . CPR should not be allowed to benefit from the fact that its failures have extended for an entire generation. Second, to the extent that the original residents are no longer available, the BRA can consider the need of current low-and-moderate-income residents of Boston as the next most likely beneficiaries. . . . In this case, CRP was in essence given the rights in

[3] See section IV of (Pet. for Cert., at 24-30), discussing this Court's holding in *Martin* v. *Wilks*, 490 U.S. 755 (1989).

trust to the West End." Moreover, in *McQueen* v. *Druker*, 438 F.2d 781, 784 (1st Cir. 1971) the Circuit Court characterized the obligation imposed by the statute this way:

> Landlord are, in return for an assured consideration, and subject to certain oversight, helping the state realize its specific priority objective of providing for urban renewal displacees [of the West End] and its more general goal of providing good, quality housing at rents which can be afforded by those of low and moderate income.

The dissent noted the statutory "full preference,"

> It is important to note that there is no indication that the benefit originally given (i.e. the full preference) was given to plaintiffs because they were predominantly white; rather, the preference was given because plaintiffs were ousted from their homes.

(Pet. for Cert., App 82a fn.9).

CONCLUSION.

The notion that families forcibly displaced by urban renewal may be denied a statutory right-of-return to housing because those displaced were predominantly white and is not subject to strict scrutiny is constitutionally offensive and is at odds with this Court's controlling precedent. For the forgoing reasons, Petitioners respectfully pray that Respondents' suggestion of mootness be denied and that Certiorari be granted.

Respectfully submitted,

ALFRED J. RASO, JOAN BELINSKI CALABRO, FRANK LEVINE, THEODORE RICHARD NEDD ON BEHALF OF THEMSELVES AND ALL OTHER DISPLACED PERSONS FROM THE WEST END OF BOSTON, AND THE OLD WEST END HOUSING CORPORATION.

By their attorneys,

CHESTER DARLING
Counsel of Record
DANIEL J. SUMPTION
MICHAEL WILLIAMS
306 Dartmouth Street
Boston, Massachusetts 02116
(617) 536-7755

Citizens for the Preservation of Constitutional Rights, Inc.